IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 223

SARA ADLER (NOW SARA COWLEY-BROWN),
Petitioner,

vs.

SIDNEY ADLER,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

FLOYD E. THOMPSON,
Attorney for Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

SUMMARY OF ARGUMENT.

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ANSWER.

Respondent, Sidney Adler, prays that the petition for writ of certiorari to review the judgment of the Supreme Court of the State of Illinois, entered in the above entitled cause, be denied on the ground that this Court does not have jurisdiction as well as on the ground that the case is correctly decided.

BRIEF IN OPPOSITION TO PETITION.

STATEMENT OF THE CASE.

The statement of petitioner, Sara Adler (now Sara Cowley-Brown) is inadequate to present the issues and respondent, Sidney Adler, feels that it will be helpful to the Court to briefly state the facts.

Petitioner and respondent were married September 24, 1895, and petitioner deserted respondent prior to July 1, 1920. (R. 3-4.) On December 30, 1920, a trust indenture (R. 12-17) and a trust agreement (R. 56-61) were executed. The indenture provided that an estate *pur autre vie* be given to three named trustees with provision for payment from income of such estate of $5,400 a year to petitioner and the balance to respondent. (A. 14.) The agreement provided that the $5,400 to be paid to petitioner was adequate for her support and maintenance (R. 57) but reserved the right to her to demand alimony in case respondent obtained a divorce from her. (R. 58.) The agreement further provided that the property was in full for all rights of petitioner in the estate of respondent except such rights as she might be entitled to have as his widow after his death or whatever rights she might have as a beneficiary under any insurance policy on his life. (R. 59.) Respondent personally guaranteed the payments provided in the indenture. (R. 60.)

On November 29, 1922, the Circuit Court of Cook County, Illinois, granted respondent a divorce from petitioner for her wilful desertion. (R. 1-5.) The decree specifically provided that the question of alimony was reserved. (R. 5.)

On December 1, 1922, the parties executed a supplemental trust indenture (R. 17-24) and supplemental agreement. (R. 24-35.) This supplemental indenture provided that petitioner was to receive an additional $4,600 a year and that the first trust indenture should extend to and secure said additional payments. (R. 18-19.) The supplemental indenture carefully separated the payments of $5,400 and $4,600. (R. 19-21.) The supplemental agreement provided that the additional payments of $4,600 a year should be in full settlement of all alimony. (R. 27.) Article Third provided that the $5,400 and the $4,600 "shall at all times be treated as distinct and independent obligations and charges upon the property hereinbefore described, and that the termination, for any reason, of the obligation to pay the additional sum ($4,600) * * * shall in no wise and under no circumstances affect or terminate the rights of said Sara Adler to receive" the $5,400 annual payment provided by the first trust indenture. (R. 28.) Respondent covenanted to pay any deficiency in the income from the trust property below the sums provided for petitioner so long as he lived. (R. 29.) Only the obligation to pay any deficiency in the $5,400 annual payments was to continue after the death of respondent and be a charge upon his estate. (R. 29.) The agreement carefully separated in every clause the two payments. (R. 25-33.)

On December 2, 1922, the Circuit Court entered a decree reciting the reservation of jurisdiction concerning alimony in the decree of November 29, 1922, and exempting from the effect of the decree the documents of December 30, 1920, and found that an agreement had been reached to pay petitioner the additional sum of $4,600 for life and that this amount had been secured by supplemental documents. (R. 5-6.) It was further decreed that the provisions of the supplemental documents were to be accepted by petitioner in full for all claims for alimony. (R. 6-7.)

The Court decreed that the supplemental documents be confirmed and that respondent make all the payments therein provided and that petitioner receive as and for her permanent alimony the $4,600 agreed to be paid by respondent. (R. 7.)

At the time of the entry of the decree of divorce respondent had a personal fortune of about $450,000 (R. 111) and an annual income of about $45,000. (R. 116.) Petitioner had nothing except her annuity of $5,400. (R. 84.)

In 1924 petitioner married John Cowley-Brown. (R. 78.) They are now married.

On May 22, 1936, respondent filed a petition in the Circuit Court praying for modification of the alimony decree entered December 2, 1922, on the following grounds: 1. A statute passed July 13, 1933, terminating alimony upon remarriage of a divorced wife; 2. The remarriage of petitioner regardless of the statute; and 3. The change in the financial condition of the respondent. (R. 8-17.)

At the time of filing this petition in 1936 respondent's estate had shrunk to half of its value in 1922 and was worth not to exceed $225,000. (R. 113-114.) His income in 1936 had shrunk to one-third of his income in 1922 and had been less than $15,000 in each of the years since 1930 except 1932. (R. 125-130.) At the time of the filing of said petition, petitioner was enjoying the assured income of $5,400 a year coming to her by virtue of the settlement of December 30, 1920, and the $4,600 a year alimony, as well as an independent inheritance from her mother and her brother which had a value of about $30,000 and which produced an income of about $600 a year. (R. 193-197.)

The master in chancery found that the $4,600 additional annual payment was alimony (R. 73), and that the petition for modification of the alimony decree should be al-

lowed because of the remarriage of Sara Adler and because of the changed financial condition of Sidney Adler. (R. 74-77.) The report of the master was confirmed by the Circuit Court and the alimony decree was modified in accordance with the petition and Sidney Adler was discharged from the payment of the $4,600 a year alimony from the date of the filing of the petition. (R. 216.) This decree was affirmed by the Illinois Supreme Court (R. 222-232), the Court concluding that "either the remarriage of respondent [Sara Adler], or the material impairment of the estate and income of petitioner [Sidney Adler], required a cancellation of all payments of alimony maturing after the date of the filing of the petition." (R. 232.)

ARGUMENT.

I.

The first point of argument of petitioner is that "the trust agreements and the decree ratifying them create a vested property interest in the real estate placed in trust and the rents and profits and issues thereof, which the decision of the court destroys."

Clearly this does not present a Federal question. While it is not stated in this point of the argument just what provision of the Federal Constitution is invoked, we assume that the point is that petitioner was deprived of her property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. The decree was entered in a regular judicial proceeding in which petitioner appeared in person and by counsel, and it is not shown in what respect there was a denial of due process. We submit that the decision of the Illinois Supreme Court was in all respects in accordance with sound principles of law, but if its decision was wrong there was no denial of due process of law. The Constitution of the United States does not guarantee that the decisions of State courts shall be free from error.

Neblett v. *Carpenter*, 305 U. S. 297, 302.
Great Northern Ry. Co. v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 364.
Central Land Co. v. *Laidley*, 159 U. S. 103, 112.

It may be that petitioner is here invoking Section 10 of Article I of the Constitution of the United States which prohibits a State from passing any law impairing the ob-

ligation of a contract. But this constitutional provision applies to legislative action and not judicial action. This Court has no jurisdiction to review a decision of a State court merely because the case involves a contract or on the ground merely that the obligation of a contract has been impaired. It must be some legislative act of the State which the State court has applied to impair the obligation of the contract before a case for this Court arises under this provision of the Constitution.

Tidal Oil Co. v. *Flanagan*, 263 U. S. 444, 451.
Central Land Co. v. *Laidley*, 159 U. S. 103, 109.
New Orleans Waterworks Co. v. *Louisiana Sugar Refining Co.*, 125 U. S. 18, 30.

II.

The argument under this point is merely that the Supreme Court of Illinois was in error when it held that the additional payment of $4,600 a year, provided by the supplemental documents and incorporated in the decree, was alimony and that other State courts have rendered decisions in conflict with the decision of the Illinois Supreme Court in this case. This does not present a Federal question. It is not within the jurisdiction of this Court to supervise the decisions of the highest courts of the several States in order to bring about uniformity in cases applying local law in the determination of non-Federal questions. However desirable it might be to have all State court decisions uniform and consistent, the Federal Constitution does not require that State court pronouncements shall be either uniform or consistent or correct.

Worcester County Trust Co. v. *Riley*, 302 U. S. 292, 299.
Milwaukee Electric Railway & Light Co. v. *Wisconsin*, 252 U. S. 100, 106.

This Court is limited to a review of so-called Federal questions and to the correction of errors relating solely to Federal law.

Murdock v. *Memphis,* 20 Wall. (87 U. S.) 590, 627.

Whatever the rule elsewhere, it is well established in Illinois that a court of chancery has, by virtue of the provisions of Section 18 of the Divorce Act, the power to modify the provision for the maintenance of the wife made in a trust agreement and thereafter by consent of the parties incorporated in the decree as provision for alimony.

Herrick v. *Herrick,* 319 Ill. 146.
Joachim v. *Joachim,* 267 Ill. App. 237.
Plotke v. *Plotke,* 177 Ill. App. 344.

While we do not consider it important to a determination of petitioner's right to a review by this Court, we call attention to the fact that the decision of the Illinois Supreme Court is in line with the great weight of authority.

Reynolds v. *Reynolds,* 53 R. I. 326, 166 Atl. 686.
Warren v. *Warren,* 116 Minn. 458, 133 N. W. 1009.
Wilson v. *Caswell,* 272 Mass. 297, 172 N. E. 251.
Eddy v. *Eddy,* 264 Mich. 328, 249 N. W. 868.
Hayes v. *Hayes* (Mo.), 75 S. W. (2nd) 614.

The cases cited by petitioner are from States where there was no statute in force at the time of the entry of the respective alimony decrees which permitted the Court to modify the alimony payments because of changed conditions. The provision of Section 18 of the Illinois Divorce Act giving the Court the power from time to time to make such changes in the allowance of alimony as

might appear reasonable and proper, was in effect when the instant decree was entered December 2, 1922 (Ill. Stat. 1921, Chap. 40, Par. 19), and had been in effect in Illinois for nearly a century. Ill. Rev. Stat. 1845, Chap. 33, Sec. 6.

III.

Under this division of her argument petitioner states that "the retrospective application of the 1933 Statute made by the court, ending the payments held to be alimony because of the remarriage of Sara Adler, operates to cut off her vested rights to such alimony, if such payments be alimony."

The Illinois Supreme Court did not rely upon the act of July 13, 1933, which amended Section 18 of the Illinois Divorce Act by providing "that a party shall not be entitled to alimony and maintenance after remarriage," in modifying the alimony decree of December 2, 1922. It decided the case under the long established authority of courts of chancery to make such changes with respect to the allowance of alimony from time to time as shall appear reasonable and proper. The Illinois Supreme Court in its opinion points out (R. 231) that it has long been the rule in Illinois that remarriage of a woman who was receiving alimony from her former husband was such a change in condition as to authorize modification of the decree to the extent of cancelling the alimony payments, citing *Stillman* v. *Stillman*, 99 Ill. 196, where the Court said in 1881 (p. 202):

> "It would be difficult to suggest or conceive any cause that would present grounds more 'reasonable and proper' for suspending further payment of alimony than the subsequent marriage of the divorced wife. * * * The obligation implied in the marital relation resting on the husband to support his wife, remains, having all the binding efficacy it had at common law. Courts of equity will be slow to change

> that obligation in any case from the husband to another man, although he may once have been the husband of the wife. Aside from its positive unseemliness, such a policy finds no support in any equitable consideration. Treating alimony, as may be done, as the equivalent of that obligation for support which arises in favor of the wife out of the marriage contract, and which is lost when that contract is annulled by the decree, she obtains the same obligation for support by a second marriage. It is unreasonable that she should have the equivalent of an obligation for support by way of alimony from a former husband, and an obligation from a present husband for an adequate support at the same time. It is illogical as well as unreasonable. It is her privilege to abandon the provision the decree of the court made for her support under the sanctions of the law, for another provision for maintenance which she would obtain by a second marriage, and when she has done so the law will require her to abide her election. There is no reason why she should not do so."

The Illinois Court points out (R. 232) that the amendment of 1933 merely adopted the general rule, already established in Illinois, that remarriage was a proper ground for cancelling alimony payments and stated that the amendment merely made mandatory upon the courts what had theretofore been discretionary. There is nothing in the opinion to indicate that the Court cancelled the alimony payments provided by the decree of December 2, 1922, because of the act of 1933. It appears from the opinion (R. 232) that the alimony payments were cancelled because of the remarriage of Sara Adler, regardless of the new statute, and because of the change in the financial condition of Sidney Adler. The latter ground clearly has no relation to the legislation passed after the decree was entered.

The construction by the Illinois Supreme Court of Section 18 of the Illinois Divorce Act as it stood in 1922, and

as it had stood since 1845, is not subject to review by this Court.

Central Land Co. v. *Laidley,* 159 U. S. 103, 110.
Lehigh Water Co. v. *Easton,* 121 U. S. 388, 391.

As long ago as 1847 this Court said:

"It is the peculiar province and privilege of the State courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretence that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary."

Commercial Bank v. *Buckingham,* 5 How. 317, 343.

"The State courts are the appropriate tribunals, as this Court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise."

Murdock v. *Memphis,* 20 Wall. 590, 626.

Clearly the decision of the Illinois Supreme Court in this case rests on local law. Where the decision of the State court rests on a non-Federal ground this Court has no jurisdiction to review the decision.

Richardson Machinery Co. v. *Scott,* 276 U. S. 128, 133.
People ex rel. v. *Atwell,* 261 U. S. 590, 592.
Bacon v. *Texas,* 163 U. S. 207, 216.

This Court is not required to reexamine the judgment of a State court simply because a Federal question may have been decided. To give it jurisdiction it must appear that such a question was necessarily involved in the decision.

New Orleans Waterworks Co. v. *Louisiana Sugar Refining Co.,* 125 U. S. 18, 29.
Moore v. *Mississippi,* 21 Wall. 636, 638.

If it were not clear from the opinion of the Illinois Supreme Court that it decided this case without reference to the amendment of 1933 to Section 18 of the Illinois Divorce Act, it is obvious that it could have decided the case by applying this statute prior to its amendment. Certainly it was not necessary to a decision of the case that the subsequently enacted amendment should be applied to cancel the alimony payments because of the changed conditions resulting from the remarriage of Sara Adler and the reduced financial ability of Sidney Adler to meet the heavy obligation to his former wife fixed by the documents of December 30, 1920, and the supplemental documents of December 1, 1922, incorporated in the alimony decree of December 2, 1922. Petitioner still has an income of $6,000 which is the equivalent of a three per cent net annual return on an estate of $200,000.

The Illinois Supreme Court, following long established practice in applying the provision of Section 18 of the Illinois Divorce Act which gives the Court authority to make such changes in the allowance of alimony from time to time as shall appear reasonable and proper, determined that the Circuit Court of Cook County had authority to cancel the allowance of $4,600 a year provided by the supplemental documents of December 1, 1922, incorporated in the decree of December 2, 1922, as a provision for alimony without reference to the subsequently enacted amendment to Section 18 of the Illinois Divorce Act. It concludes its opinion with the statement that "either the remarriage of respondent, [Sara Adler,] or the material impairment of the estate and income of petitioner, [Sidney Adler,] required a cancellation of all payments of alimony maturing after the date of the filing of the petition." (R. 232.)

In any event there was no retroactive application of the amendment of 1933. As the Illinois Supreme Court said

(R. 232), the trial court did not undertake to give the statute a retroactive effect, for the decree made the modification effective as of the date of the filing of the petition. All payments which had accrued prior to the filing of the petition were paid. Under the well established law, the only vested rights the petitioner had under the alimony decree were as to payments already due.

Sistare v. *Sistare*, 218 U. S. 1.

Respectfully submitted,

FLOYD E. THOMPSON,

Attorney for Respondent.